

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**REPORT ON AN INVESTIGATION CONDUCTED INTO ALLEGATIONS OF
MALADMINISTRATION, IMPROPER OR SUSPECTED IMPROPER CONDUCT IN
THE APPOINTMENT OF MR PREVIN DEVALINGAM GOVENDER IN THE POST OF
CHIEF OF EMERGENCY BY THE TSHWANE METROPOLITAN MUNICIPLAITY**

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Executive Summary

- (i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution, 1996) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act, 1994).
- (ii) The report communicates the findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution following an investigation conducted into allegations of maladministration, improper or suspected improper conduct in connection with the appointment of Mr Previn Devalingam Govender (Mr Govender) in the post of Chief of Emergency by the Tshwane Metropolitan Municipality (the City of Tshwane).
- (iii) The investigation originates from a complaint lodged by Mr Sydney Johannes Tshabalala (the Complainant) on 27 September 2018 in connection with what he considered to be maladministration, improper or suspected improper conduct by the City of Tshwane and/or its functionaries in the process leading to the appointment of Mr Govender in the post of Chief of Emergency without him meeting the minimum requirements for the post.
- (iv) The Complainant alleged that:
 - a) The City of Tshwane advertised the post of Chief of Emergency with a closing date of 20 March 2017. The *Job Advertisement* stipulated specific educational requirements and work related experience for the post. The educational requirements for the post was a relevant bachelor degree or equivalent qualification;
 - b) The Selection Panel Chaired by the former Municipal Manager, Dr Moeketsi Mosola (Dr Mosola) shortlisted five candidates for interview which were held on 23 May 2017. Amongst the shortlisted and interviewed candidates was Mr

Govender who was recommended for appointment and was eventually appointed in the post with effect from 1 August 2017. The appointment is for five (5) years employment contract ending on 31 July 2022. The annual salary is between R1 219 663.00 to R1 829 495.00 per annum;

- c) Mr Govender was shortlisted, interviewed, recommended and appointed in the post of Chief of Emergency by the City of Tshwane and/or its functionaries despite him not being in possession of either a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, therefore he was irregularly appointed in the post.

- (v) The Complainant requested an investigation to be conducted by the Public Protector to determine if there were any irregularities in connection with the qualifications submitted by Mr Govender and other information when he applied, got shortlisted, interviewed and eventually appointed in the post of Chief of Emergency by the City of Tshwane.

- (vi) Based on the analysis of the complaint and the allegations contained therein, the following issue was identified to inform and focus the investigation:
 - (a) **Whether the City of Tshwane and/or its functionaries improperly appointed Mr Govender to the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, and if so, whether such conduct was improper and constituted maladministration in state affairs as contemplated in section 182 of the Constitution, 1996?.**

- (vii) The investigation process included correspondence and the exchange of documentation between the Public Protector, the City of Tshwane and the City of Ekurhuleni.

- (viii) Correspondence issued in terms of section 7(4)(a) of the Public Protector Act, 1994 calling for a response to the allegations, as well as documentation

pertinent to the investigation were issued to responsible persons in the City of Tshwane and the City of Ekurhuleni respectively.

- (ix) Notices in terms of section 7(9)(a) of the Public Protector Act, 1994 were issued to the City of Tshwane Municipal Manager, Mr Govender and Councillor D Kisoonduth.
- (x) The other Selection Panel members namely, Dr Mosola, Councillor C Brink, Councillor I Pietersen and Ms P Yako could not be traced and hence they were not served with copies of the section 7(9) notice.
- (xi) All relevant documentation and correspondence was obtained, analysed, assessed and evaluated in particular, copies of an advertisement published in the City of Tshwane's Job Forum for the vacant position of Chief of Emergency, Mr Govender's qualifications and his *Curriculum Vitae*, *Copy of Application for Employment at City of Tshwane Form*, *the City of Tshwane Staffing Policy, 2008*, *Senior Manager Assessment Report and Personal Credential Verification Report*. Relevant legislation, policies and other related prescripts were also considered and applied throughout the investigation.
- (xii) Key legislation and policies taken into account to determine if there had been maladministration or improper conduct on the part of the City of Tshwane and/or its functionaries were those that impose administrative standards that should have been complied with by the City of Tshwane and/or its functionaries when dealing with recruitment and selection process for posts of senior managers in the municipality namely:
 - (a) **The Constitution, 1996** which is the supreme law of the Republic in terms of section 2.¹

¹ Section 2 of the Constitutions, 1996 provides that:
This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

- (aa) Section 182(1)(a) to (c) of the Constitution, 1996 gives the Public Protector the power, as regulated by national legislation to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action; and
- (bb) Section 195(1) of the Constitution, 1996 which provides that public administration must be governed by the democratic values and principles enshrined in the Constitution.
- (b) The Public Protector Act, 1994** which gives effect to section 182(1)(a) to (c) of the Constitution, 1996. Section 6(4)(a)(i) of the Public Protector Act, 1994 provides that *“the Public Protector shall be competent to investigate on his or her own initiative or receipt of a complaint maladministration in connection with the affairs of government at any level.”*
- (c) The Municipality Systems Act, 2000 [as amended by the Municipal Systems Amendment Act, 2011]**, which provides for the required qualifications for the appointment of senior managers in the municipalities in terms of section 56.
- (d) Local Government: Regulations on appointment and conditions of employment of senior managers, 17 January 2014**, which the selection and recruitment procedure, qualifications and competency for appointment of senior managers in the municipality.
- (e) The Disaster Management Act, 57** which provides for the establishment and management of Disaster Management Centres.
- (f) The Fire Brigade Services Act, 1987** which provides for the confirmation of the appointment of Chief of Fire in a municipality.

- (g) **The Higher Education Act, 1997** which provides for the definition of a qualification;
 - (h) **The National Qualification Framework Act, 2008** which provides for the definition of national qualifications framework;
 - (i) **The Labour Relations Act, 1995** which prohibits unfair labour practices in terms of section 189.
 - (j) **The Municipality Financial Systems Act, 2003** which provides for financial management in the municipalities.
 - (k) **The City of Tshwane's Staffing Policy, 2008** which provides for the procedures to be following during the recruitment and selection process.
- (xiii) Having considered the evidence obtained during the course of the investigation, weighed against the relevant regulatory framework as well as the allegations contained in the complaint received when weighed against the standard that was expected to be upheld by the City of Tshwane and/or its functionaries, I now make the following findings:
- (a) **Regarding whether the City of Tshwane improperly appointed Mr Govender to the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, and if so, whether such conduct was improper and constituted maladministration in state affairs as contemplated in section 182 of the Constitution, 1996?**
 - (aa) The allegation that the appointment of Mr Govender to the post of Chief of Emergency by the City of Tshwane and/or its functionaries was irregular, is substantiated.

- (bb) Mr Govender did not meet the appointment requirements for the post of Chief of Emergency as stipulated in the *Job Advertisement* for the post and in terms of section 56 of the Municipal Systems Act, 2000 read with Regulations 8 and 9 of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, 17 January 2014 (Regulations, 2014) in that, his highest qualification being the Associate Diploma in Fire Technology is neither a bachelor degree nor an equivalent qualification.
- (cc) The Associate Diploma in Fire Technology does not meet the definition of a qualification in terms of the Higher Education Qualifications Framework Act, 1997 (Act No. 101 of 1997) and the National Qualifications Framework Act, 2008;
- (dd) The insertion by Mr Govender in the *Application for Employment at City of Tshwane Form* and the *Curriculum Vitae* reflecting that his qualification is an *Advanced (Associate) Diploma in Fire Technology equivalent (NQF 7)* while being aware that it was not, is manifestly incorrect, false, misleading and constitutes an act of misrepresentation;
- (ee) The Selection Panel overlooked the *MIE Qualification Verification Report* which pickup materially discrepancies and misrepresentation on the information submitted by Mr Govender relating to his qualification and it proceeded with the recruitment and selection process as if all was above board;
- (ff) The salary paid to Mr Govender from 1 August 2017 to date, constitutes unlawful enrichment as he was he not qualified for appointment in the post of Chief of Emergency; and
- (gg) The salary paid to Mr Govender from 1 August 2017 to date, while he was not qualified for appointment in the post of Chief of Emergency constitutes irregular expenditure on the part of the City of Tshwane.

- (b) In the circumstances, I find that the appointment of Mr Govender in the post of Chief of Emergency was irregular, unlawful and thus constituted improper conduct as envisaged by section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994.
- (c) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, 1996 with a view to remedying the maladministration and improper conduct referred to in this report is the following:
- (a) **The MEC for Corporative Governance and Traditional Affairs for the Gauteng Provincial Government to:**
- (aa) Consider the report, and where appropriate take steps within fourteen (14) days of issuing of this report as provided for in terms of section 56(5) of the Municipal Systems Act, 2000 with a view to remedying the maladministration and improper conduct identified in the report.
- (b) **The Tshwane Metropolitan Council to:**
- (bb) Take cognisance of the findings of this report as it relates to the irregularities in the recruitment and selection of senior managers accountable to the Municipal Manager that may occur in future relating to the recruitment, selection and appointment of senior managers accountable to the municipal manager;
- (c) **The Municipal Manager of the Tshwane Metropolitan Municipality to;**
- (i) Take steps and initiate disciplinary process against Mr Govender as provided for in terms of the Labour Relations Act, 66 of 1995 and the City of Tshwane Staffing Policy, 2008;

- (ii) Take steps and initiate legal action to review and set aside the appointment of Mr Govender on the basis of legality;
- (ii) Take steps and initiate a process of recovering a proportionate and reasonable portion of the amount paid to Mr Govender in the form of a salary and other fringe benefits commensurate with the post of Chief of Emergency;
- (iii) Take steps and initiate a process of recruiting a suitably qualified person for the post of Chief of Emergency should there still a need to fill the vacancy;
- (iv) Report the irregular expenditure relating to the salary paid to Mr Govender as prescribed in terms of the relevant provisions of the Municipal Finance Management Act, 2003.

(d) MONITORING

- (i) The MEC for Corporative Governance and Traditional Affairs for the Gauteng Provincial Government, must within twenty (21) days of issuing this report, submit to me an implementation plan reflecting how the remedial action referred to in paragraph (aa) has been implemented;
- (ii) The Municipal Manager of the Tshwane Metropolitan Municipality must, within thirty (90) days from the date of issuing of this report and for my consideration, submit an Implementation Plan to my office indicating how the remedial action referred to in paragraphs (c)(i) to (c)(iv) of this report will be implemented;

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1 INTRODUCTION

- 1.1 This is my report issued in terms of section 182(1)(b) of the Constitution, 1996 read with section 8(1) of the Public Protector Act, 1994. The report is submitted in terms of section 8 of the Public Protector Act, 1994 to:
- 1.1.1 The MEC for Cooperative Governance and Traditional Affairs in the Gauteng Provincial Government;
 - 1.1.2 The Municipal Manager for Tshwane Metropolitan Municipality;
 - 1.1.3 Mr Govender, the Chief of Emergency for Tshwane Metropolitan Municipality; and
 - 1.1.4 Mr Sydney Johannes Tshabalala, the Complainant.
- 1.2 The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, 1996 following an investigation into allegations of maladministration, improper or suspected improper conduct, relating to the appointment of Mr Previn Devalingam Govender (Mr Govender) in the post of Chief of Emergency, by the City of Tshwane and/or its functionaries in August 2017.

2 THE COMPLAINT

2.1 The investigation originates from a complaint received from Mr Sydney Johannes Tshabalala (the Complainant) on 27 September 2018 alleging that:

2.1.1 The City of Tshwane advertised the post of Chief of Emergency with a closing date of 20 March 2017. The *Job Advertisement* stipulated specific educational requirements and work related experience for the post. The educational requirements for the post was a relevant bachelor degree or equivalent qualification;

2.1.1 The Selection Panel, chaired by the former Municipal Manager, Dr Moeketsi Mosola (Dr Mosola) shortlisted five candidates for interviews which were held on 23 May 2017. Amongst the shortlisted and interviewed candidates was Mr Govender who was recommended for appointment and was eventually appointed in the post with effect from 1 August 2017. The appointment is for five (5) years employment contract ending on 31 July 2022. The annual salary is between R1 219 663.00 to R1 829 495.00 per annum; and

2.1.2 Mr Govender was shortlisted, interviewed, recommended and appointed in the post of Chief of Emergency by the City of Tshwane and/or its functionaries despite him not being in possession of either a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, therefore he was irregularly appointed in the post.

2.2 The investigation of the complaint was conducted in terms of section 182 of the Constitution, 1996 which gives the Public Protector the power to investigate any alleged, suspected improper or prejudicial conduct in state affairs. To report on that conduct and to take appropriate remedial action; and in terms of section 6(4) and (5) of the Public Protector Act, 1994 which regulate the manner in which the power conferred by section 182 of the Constitution, 1996 may be exercised in respect of government at any level.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent state institution established under section 181(1)(a) of the Constitution, 1996 to strengthen constitutional democracy through amongst others, investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution, 1996 provides that:

“The Public Protector has the power as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action”.*

3.3 Section 182(2) of the Constitution, 1996 provides that the Public Protector has additional powers and functions prescribed by national legislation.

3.4 The Public Protector is further mandated by the Public Protector Act, 1994 to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation and advising the complainants regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ, held that the remedial action taken by the Public Protector has a binding effect by stating that:²

² [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) para [76].

“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”³.

3.6 In the above-mentioned Constitutional Court judgment, Mogoeng CJ, further stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (Paragraph 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (Paragraph 68);

3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (Paragraph 69);

3.6.5 Every complaint requires a practical or effective remedy that is in *sync* with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the

³ *Supra* para [73].

demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (Paragraph 70);

3.6.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (Paragraph 71);

3.6.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure available. "*Action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence [Paragraph 71(a)];

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation [Paragraph 71(d)]; and

3.6.9 "*Appropriate*" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case [Paragraph 71(e)].

3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP), the Constitutional Court held as follows, when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);

- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):
- (a) Conduct an investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105);
- 3.7.6 The fact that there are no firm findings of wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108); and
- 3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
- 3.8 The City of Tshwane is an organ of state as defined in section 239(a) of the Constitution, 1996 and its conduct amounts to conduct in state affairs. The complaint therefore falls within the ambit of the Public Protector's mandate and jurisdiction to investigate and were appropriate take remedial action to cure the impropriety that occurred. In this regard, the mandate and jurisdiction of the

Public Protector to investigate this complaint was not disputed by the parties involved.

4 THE INVESTIGATION

4.1 The investigation was approached using an enquiry process that seeks to find out:

4.1.1 What happened?

4.1.2 What should have happened?

4.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

4.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been had the maladministration or improper conduct did not occur?

4.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the course of the investigation. In this particular case, the factual enquiry principally focused on whether or not a proper recruitment and selection process was adhered to by the City of Tshwane and/or its functionaries leading to the appointment of Mr Govender in the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post.

4.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the City of Tshwane and/or its functionaries to prevent maladministration and improper conduct from occurring.

4.1.7 The enquiry regarding the remedy or remedial action taken seeks to explore options for redressing the consequences of improper conduct or maladministration that occurred.

4.2 Based on the analysis and evaluation of the complaint, the following issue was identified to inform and focus the investigation:

4.2.1 Whether the City of Tshwane and/or its functionaries improperly appointed Mr Govender to the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, and if so, whether such conduct was improper and constituted maladministration in state affairs as contemplated in section 182 of the Constitution, 1996?

5 THE KEY SOURCES OF INFORMATION AND DOCUMENTATION RECEIVED

5.1 Documentation received and exchanged during the investigation

5.1.1 Copies of the following documentation were received and exchanged during the course of the investigation:

5.1.1.1 Copy of the *Complaint Form* dated 27 September 2018 outlining the basis of the complaint;

5.1.1.2 Copy of the *Job Advertisement* for the post of Chief of Emergency, Ref EMSS071-2017 with a closing date of 20 March 2017 published in City Press Newspaper;

5.1.1.3 Copy of letter dated 25 January 2019 sent to the City of Tshwane and addressed to Dr Mosola requesting a response to the allegations contained in the complaint;

- 5.1.1.4 Copy of a letter received from the City of Tshwane dated 12 February 2019 and titled, *Investigation into allegations of maladministration, improper or suspected improper conduct relating to the appointment of the Chief of Emergency Services*, signed by Dr Mosola responding to the allegations in the complaint;
- 5.1.1.5 Copy of a letter dated 13 March 2019 sent to the City of Tshwane and addressed to Dr Mosola requesting additional information relating to the investigation of the complaint following receipt of a response dated on 12 February 2019;
- 5.1.1.6 Copy of a letter received from City of Tshwane dated 8 April 2019 and titled, *Request for additional information relating to the investigation into allegations of maladministration, improper or suspected improper conduct on the appointment of the Chief of Emergency Services*, signed by Dr Mosola responding to the request for additional information letter;
- 5.1.1.7 Copy of *Council Resolution of 23 February 2017, Reference Number 81397/1* relating to a request to advertise various positions of senior managers directly accountable to the Tshwane Municipal Manager including the appointment of the Selection Panel members to undertake the required recruitment and selection process;
- 5.1.1.8 Copy of *Application for Employment at City of Tshwane Form* dated 9 March 2017 signed by Mr Govender when applying for the post of Chief of Emergency Ref No: EMSS071-2017;
- 5.1.1.9 Copy of *Curriculum Vitae* reflecting personal details, qualifications and employment history of Mr Govender;
- 5.1.1.10 Copy of *Matriculation Certificate*, (Certificate Number 49043), awarded to Mr Govender in April 1989 and reflecting the subjects passed;

- 5.1.1.11 Copy of *Associate Diploma in Fire Technology* (Certificate Number 90/2314), awarded to Mr Govender in June 1996 by the South African Fire Service Institute (SAFSI);
- 5.1.1.12 Copy of *Graduate Certificate* awarded to Mr Govender in 1996 by the Graduate Institute of Fire Engineers (GIFE);
- 5.1.1.13 Copy of *Training Officers' Certificate*, (Certificate Number 665), awarded to Mr Govender by Technikon Natal in May 1997;
- 5.1.1.14 Copy of *Certificate of Accreditation* awarded to Mr Govender in October 2002 by the International Fire Services Accreditation Congress (IFSAC);
- 5.1.1.15 Copy of *Certificate of Training on EMS Internal Auditor Training Course* awarded to Mr Govender in October 2003;
- 5.1.1.16 Copy of *NOSA Certificate* (Certificate Number 131198) awarded to Mr Govender in April 2003;
- 5.1.1.17 Copy of *Certificate* issued by the *Nelson Mandela Metropolitan University* to Mr Govender for successfully completing a short learning programme in Training for Peace Officers;
- 5.1.1.18 Copy of *Certificate* awarded to Mr Govender by the University of South Africa for successfully completing an Introduction to Disaster Management course;
- 5.1.1.19 Copy of *Certificate* issued to Mr Govender by the Stellenbosch University for successful completing a course on Municipal Financial Management in December 2014;
- 5.1.1.20 Copy of *Personal Credential Verification Report* of Mr Govender dated 11 May 2017 conducted by Managed Integrity Evaluation (Pty) Ltd;
- 5.1.1.21 Copy of *Senior Manager Assessment Report* for Mr Govender dated 15 May 2017 conducted by Landelanhi Assessments (Pty) Ltd;

- 5.1.1.22 Copy of Mr Govender's *Identity Card* issued in May 2015 reflecting that he is a citizen of the Republic of South Africa;
- 5.1.1.23 Copy of *Driving Licence* for Mr Govender, code EC1 with expiry date of 17 October 2024;
- 5.1.1.24 Copy of Mr Govender's *Curriculum Vitae* received from the City of Ekurhuleni relating to his application and appointment in the post of Divisional Head: DEMS Strategy and Planning in the City of Ekurhuleni prior to him being appointed in the City of Tshwane;
- 5.1.1.25 Copy of *Qualifications and Training Form* for Mr Govender dated 6 January 2015 reflecting his qualifications at the time when he applied for the post of Divisional Head: DEMS Strategy and Planning at the City of Ekurhuleni;
- 5.1.1.26 Copy of a letter titled *Appointment as Divisional Head: DEMS Strategy and Planning in the Disaster and Emergency Management Services Department* dated 20 October 2014 appointing Mr Govender as Divisional Head: DEMS Strategy and Planning for a fixed term contract of five (5) years at the City of Ekurhuleni;
- 5.1.1.27 Copy of *Ad Response-City of Tshwane-Chief of Emergency* reflecting the names of 36 candidates who responded to the advertised post of Chief of Emergency including Mr Govender;
- 5.1.1.28 Copy of unsigned and undated, *Screening of candidates for the position of Chief of Emergency*, initiated by ME Mosola, Office of the Municipal Manager reflecting the names of five (5) candidates shortlisted for the post of Chief of Emergency;
- 5.1.1.29 Copy of *Minutes: Selection panel meeting for the appointment of Chief of Emergency held in Pretoria on 2 May 2017*, relating to the selection criteria

- for the shortlisting process and suitability of candidates for appointment in the post of Chief of Emergency;
- 5.1.1.30 Copy of undated *Shortlisting for Chief of Emergency (EMSS071-2017)* reflecting the qualifications of the five (5) shortlisted candidates and names of Selection Panel members;
 - 5.1.1.31 Copy of undated *Score Summary-Interviews* of the five (5) interviewed candidates for the post of Chief of Emergency reflecting their individual interview scores;
 - 5.1.1.32 Copy of *Final Panel Interviews* outcome dated 23 May 2017 and signed by Dr Mosola, reflecting the names of two (2) candidates recommended to be considered for appointment by the Tshwane Municipal Council, namely Mr Govender and Mr Masibi;
 - 5.1.1.33 Copy of *Minutes of the interview panel for the interviews of the post of Chief of Emergency, held in Johannesburg on 23 May 2017* signed by Dr Mosola reflecting the outcome of the interview for the post of Chief of Emergency;
 - 5.1.1.34 Copy of *Council Resolution of 29 June 2017* requesting the Tshwane Municipal Council to approve appointments for the posts of Governance and Support Officer, Chief Operations Officer, Chief Audit Executive, Chief of Emergency, Group Head: Group Communication and Marketing and Group Head: City Strategy and Organisational Performance;
 - 5.1.1.35 Copy of undated *Fixed term employment contract entered into by and between the City of Tshwane Metropolitan and Previn Devalingam Govender*, signed by Dr Mosola and Mr Govender;
 - 5.1.1.36 Copy of undated letter titled, *Confirmation of Appointment as Chief of Emergency for City of Tshwane*, signed by Dr Mosola confirming the appointment of Mr Govender as Chief of Emergency for the City of Tshwane

in terms of the Fire Brigade Services Act No 99 of 1987 and the Disaster Management Act No 57 of 2002;

- 5.1.1.37 Copy of sworn *Affidavit* by Mr Govender dated 5 September 2018;
- 5.1.1.38 copy of a sworn *Affidavit* deposed by Ms Helena Andriana Zaayman, the Senior HR Acquisition Specialist-Group Capital Management for the City of Tshwane dated 10 September;
- 5.1.1.39 copy of an e-mail dated 17 August 2018 addressed to J Samuels of SAQA, from Ms Salome van den Berg, the Chief Executive Officer of Southern African Emergency Services Institute;
- 5.1.1.40 Copy of a letter from *Southern African Emergency Services Institute* dated 28 August 2018 addressed to Mr Mankopane Mlolawa, Senior Forensic Investigator-Forensic Service for the City of Tshwane;
- 5.1.1.41 Copy of letter dated 7 September 2018 and signed by Mr Joe Samuels, the Chief Executive Officer of SAQA addressed to Mr Mankopane Mlolawa, Senior Forensic Investigator-Forensic Service for the City of Tshwane;
- 5.1.1.42 Copy of titled, *Report on Misrepresentations Made by a Section 56 Manager with regard to Qualifications and Proposals for Corrective Measures to be followed*, dated 31 October 2019 and signed by Mr Ntsimane;
- 5.1.1.43 Copies of section 7(9) notice served on the former Acting Municipal Manager for the City of Tshwane, Mr Ntsimane, Mr Govender and Councillor D Kisoonduth;
- 5.1.1.44 Copy of a letter dated 16 October 2019 received from Mr Govender requesting an extension to respond to the section 7(9) notice;

- 5.1.1.45 Copy of a letter dated 22 October 2019 received from Muthray & Associates Incorporated acting on behalf of Mr Govender, requesting an extension to respond to the section 7(9) notice;
- 5.1.1.46 Copy of a letter dated 1 November 2019 received from Muthray & Associates Incorporated responding to the section 7(9) notice on behalf of Mr Govender;
- 5.1.1.47 Copy of a response to the section 7(9) notice received from the City of Tshwane City dated 18 October 2019 signed by Mr Ntsimane; and
- 5.1.1.48 E-mail dated 29 November 2019 sent to Mr Govender reminding him that his response to the section 7 (9) notice has not yet been received.

5.2 Website consulted during the investigation

5.2.1 The following websites were consulted during the course of the investigation of the complaint:

5.2.1.1 www.tshwanecity.org;

5.2.1.2 www.saga.org;

5.2.1.3 www.tshwaneuniversity.org;

5.3 Legislative framework consulted during the investigation

5.3.1 The following legislative framework was consulted during the course of the investigation:

5.3.1.1 The Constitution of the Republic of South Africa, 1996;

5.3.1.2 The Public Protector Act, 1994 (Act 23 of 1994);

- 5.3.1.3 The Public Protector Rules, 2018;
- 5.3.1.4 The Municipal Systems Act, 2000 (Act No. 32 of 2000);
- 5.3.1.5 The Municipal Finance Management Act;2003 (Act No. 56 of 2003)
- 5.3.1.6 The Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, 17 January 2014;
- 5.3.1.7 The Disaster Management Act 57 (Act No. 3 of 2002);
- 5.3.1.8 The Fire Brigade Services Act;1987(Act No. 99 of 1987)
- 5.3.1.9 The Labour Relations Act, 1995 (No. 66 of 1995);
- 5.3.1.10 The Higher Education Act, 1997 (Act No 101 of 1997); and
- 5.3.1.11 The National Qualifications Framework Act, 2008.

5.4 Policies and other prescripts

5.4.1 The following policy was consulted during the course of the investigation:

- 5.4.1.1 The Collective Agreement: Staffing Policy of the City of Tshwane Metropolitan Municipality of 2008.

5.5 Reports

5.5.1 The following reports were consulted during the course of the investigation:

- 5.5.1.1 *The Final Forensic Investigation Report: FS27/07/2018: Verification of qualifications of senior officials (Chief of Emergency Services) [the Forensic Report]* dated 31 October 2018; and

5.5.1.2 *Report on misrepresentations made by a section 56 manager with regard to qualifications and proposals for corrective measures to be followed (Report on misrepresentation) dated 31 October 2019.*

5.6 Case law

5.6.1 The following cases were consulted during the course of the investigation:

5.6.1.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT143/15; CCT171/15) [2016] ZACC 11; (2016) (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);*

5.6.1.2 *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP);*

5.7 The Public Protector Touchstones:

5.7.1 The following Public Protector's touchstone report has reference to the outcome of the investigation:

5.7.1.1 *Report No.23 of 2013/2014 on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)*

6 THE DETERMINATION OF THE ISSUE IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSION MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

6.1 Regarding whether the City of Tshwane and/or its functionaries improperly appointed Mr Govender to the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, and if so, whether such conduct was improper and constituted maladministration in state affairs as contemplated in section 182 of the Constitution, 1996?.

Common cause facts

- 6.1.1 It is *common cause* that the City of Tshwane advertised the post of Chief of Emergency in the City Press with a closing date of 20 March 2017 with a salary range of R1 219 663.00 to R1 829 495.00 per annum. Mr Govender was shortlisted, interviewed, recommended and eventually appointed in the post of Chief of Emergency with effect from 1 August 2017 for five (5) years fixed term contract of employment ending on 31 July 2022; and
- 6.1.2 It is also *common cause* that the post of Chief of Emergency is a senior management post accountable to the City of Tshwane Municipal Manager.

Issue in dispute

- 6.1.3 It is the Complainant's contention that Mr Govender was shortlisted, interviewed, recommended and eventually appointed in the post of Chief of Emergency without him meeting the minimum educational requirements stipulated in the *Job Advertisement* for the post as well as the qualifications required for appointment of senior managers accountable to the City of Tshwane Municipal Manager in terms of section 56 of the Municipal Systems Act, 2000.
- 6.1.4 The key issue to be determined is whether the City of Tshwane and/or its functionaries appointed Mr Govender in the post of Chief of Emergency without him meeting the minimum educational requirements for the post as stipulated in the *Job Advertisement* and if so, whether such conduct was improper and

constituted maladministration in state affairs as contemplated in section 182 of the Constitution, 1996.

6.1.5 The investigation of this complaint focused on the recruitment and selection process with regard to, advertisement and receiving of applications, shortlisting, interviews, background and reference checks, verification of qualifications, responses received from the City of Tshwane, one of the Selection Panel member and Mr Govender with regard to the section 7(9) notices served.

6.1.6 Further focus was also placed on the:

6.1.6.1 *Collective Agreement: Staffing Policy of the City of Tshwane Metropolitan Municipality of 2008 (the City of Tshwane Staffing Policy, 2008);*

6.1.6.2 *Final Forensic Investigation Report: FS27/07/2018 Verification of qualifications of senior officials (Chief of Emergency Services) [the Forensic Report] dated 31 October 2018;*

6.1.6.3 *Report on misrepresentations made by a section 56 manager with regard to qualifications and proposals for corrective measures to be followed (Report on misrepresentation) dated 31 October 2019;*

6.1.6.4 *Managed Integrity Evaluation (Pty) Ltd, Personal Credential Verification Report of Mr Govender dated 11 May 2017 (MIE Verification Report);*

6.1.6.5 Copy of legal opinion from Ngoato Attorneys obtained by the City of Tshwane dated 15 October 2019 (Ngoato Attorneys legal opinion); and

6.1.6.6 Copy of legal opinion from Diale Mogashoa Attorneys obtained by the City of Tshwane dated 2 October 2019.

6.2 Upon receipt of the complaint on 27 September 2018, the City of Tshwane was informed of the complaint in a letter dated 25 January 2019. It was requested to respond to the alleged appointment of Mr Govender in the post of Chief of

Emergency without him being in possession of a relevant bachelor degree or equivalent qualification. The Letter was addressed to Dr Mosola, the former Municipal Manager of the City of Tshwane.

- 6.3 The City of Tshwane responded to the alleged appointment of Mr Govender in the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification through a letter signed by Dr Mosola dated 12 February 2019 and titled, *“Investigation into allegations of maladministration, improper or suspected improper conducting relating to the appointment of the Chief of Emergency Services”*. In the response, the City of Tshwane denied that Mr Govender was appointed in the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification stating amongst others that:

“Mr PD Govender met the appointment requirements to be appointed as Chief of Emergency and this was informed by the qualification that he indicated on his application, namely an Associate Diploma in Fire Technology. The Associate Diploma in Fire Technology was seen as equivalent to a Bachelor’s Degree because of the following:

- *According to the current approved Staffing Policy Clause 3.47 a **“Tertiary Qualification”** means at least a three year post matric qualification, such as a university degree or a national diploma, (A one year post graduate degree/national Higher Diploma and B.Tech Diploma are also tertiary qualifications);*
- *The qualification of Associate Diploma in Fire Technology is a three year post matric qualification and was therefore seen to be an equivalent qualification; and*
- *This was further informed by the current standard practice of recognition of equivalent qualifications in the City of Tshwane”.*

- 6.4 The response further stated that the Fire Brigades Services Act of 1987, does not set requirements for the appointment of Chief of Fire/ Emergency and there were no legally prescribed standards in the form of regulatory framework against which the National Disaster Management Centre can evaluate whether or not the

qualifications and experience of a Chief Fire Officer are required to be compliant with.

6.5 The response letter was accompanied with copies of documentation amongst those listed in paragraph 5.1 above. Upon assessing and evaluating the response against the documentation submitted by the City of Tshwane and the relevant legislation, material discrepancies were identified in relation to information reflected in copies of Govender's *Application for Employment at City of Tshwane Form, Curriculum Vitae, Associate Diploma in Fire Technology (Certificate Number 90/2314)* and *Senior Manager Assessment Report* dated 15 May 2017, against the information reflected in the *Personal Credential Verification Report, Verification of Qualification and Background Checks Report*. The identified material discrepancies relate to the following:

- 6.5.1 In Mr Govender's *Curriculum Vitae, Application for Employment at Tshwane City Form* and *Senior Manager Assessment Report* dated 9 May 2017, it is stated that his highest qualification is an *Advanced (Associate) Diploma in Fire Technology (NQF 7)* awarded by SAESI in June 1996, whereas the actual qualification certificate is written *Associate Diploma in Fire Technology* awarded by SAESI in June 1996;
- 6.5.2 Neither the words *Advanced Associate Diploma in Technology* nor the term *NQF level 7* appear or is reflected on the qualification certificate as stated in the *Curriculum Vitae, Application for Employment at Tshwane City Form* and the *Senior Manager Assessment Report* of Mr Govender;
- 6.5.3 It was uncertain as to whether the qualification was an *Associate Diploma in Fire Technology* as reflected on the qualification certificate itself or an *Advanced (Associate) Diploma in Fire Technology (NQF 7)* as stated in the *Curriculum Vitae, the Application for Employment at Tshwane City Form* and *Senior Manager Assessment Report*;

- 6.5.4 On the other hand, the *Personal Credential Verification Report, Verification of Qualification and Background Checks Report* conducted by Managed Integrity Evaluation (Pty) Ltd, reflect that the qualification submitted for verification was an *Advanced (Associate) Diploma in Fire Technology (NQF 7)* and the outcome of the verification process was that Mr Govender was awarded an *Associate Diploma in Fire Technology* by SAESI in June 1996 without a NQF level status and not an *Advanced (Associate) Diploma in Fire Technology (NQF 7)* as he claimed.
- 6.5.5 In addition to the material discrepancies identified, was that despite the City of Tshwane contending that the *Associate Diploma in Fire Technology* was a three (3) year post matric qualification and seen to be an equivalent qualification, no evidence was submitted to substantiate the claim that the *Associate Diploma in Fire Technology* was a three (3) year post matric qualification equivalent to a bachelor degree;
- 6.5.6 Stating that the *Associate Diploma in Fire Technology* was seen as an equivalent qualification would imply that it was assumed that it was a three (3) year qualification that was equivalent to a bachelor degree without it being verified and evaluated by a relevant independent regulatory body; and
- 6.5.7 Seniors managers in local municipalities are recruited, selected and appointed in terms section 56 of the Municipal Systems Act, 2000 and not in terms of the Fire Brigades Service Act of 1987 and/or the Disaster Management Act.
- 6.6 Paragraph 4 of the *Fixed term employment contract entered into by and between the City of Tshwane Metropolitan and Previn Devalingam Govender* stipulates as follows:

“4.1 *The Employer hereby employs the Employee on a fixed term contract and the Employee hereby accepts employment as, Chief of Emergency, with inherent ex officio authority under section 5(1) of the Fire Brigade Services Act (Act No. 99 of 1987) and*

under section 45 of the Disaster Management Act (Act No. 57 of 2002) subject to:

- 4.1.1 *The terms and conditions as contained in this contract;*
- 4.1.2 *Consistency with the Municipality Systems Act;*
- 4.1.3 *Any Regulations as may be prescribed that are applicable to managers appointed in terms of section 56 of the Municipal Systems Act, (directly accountable to municipal managers); and*
- 4.1.4 *Any other applicable labour legislation”.*

6.6.1 A copy of undated letter titled, *Confirmation of Appointment as Chief of Emergency for City of Tshwane*, signed by Dr Mosola confirms the appointment of Mr Govender as Chief of Emergency for the City of Tshwane in terms of the Fire Brigade Services Act No 99 of 1987 and the Disaster Management Act No 57 of 2002;

6.6.2 It is the view therefore that, section 5(1) of the Fire Brigade Services Act, 1987 read with section 45 of the Disaster Management Act, 2002 provides Mr Govender with powers and responsibilities stipulated in these two pieces of legislation to enable him to discharge his responsibilities as head of disaster management/chief fire in the City of Tshwane;

6.6.3 However, his recruitment and selection and appointment as a senior manager directly accountable to the municipal manager was undertaken in terms of the Municipal Systems Act, 2000. His appointment in terms of section 5(1) of the Fire Brigade Services Act, 1987 read with section 45 of the Disaster Management Act, 2002 is therefore secondary to him have been appointed as a senior manager in terms of section 56 of the Municipal Systems Act,2000;

6.6.4 The above letters are a confirmation of appointing him as the Chief Fire officers and head of disaster management responsible for the Tshwane City as required by the two piece of legislation that a person be appointed as a chief Fire for the local authority; and

- 6.6.5 The contention by the City of Tshwane and/or its functionaries that he was appointed in terms of the section 5(1) of the Fire Brigade Services Act (Act No. 99 of 1987) and under section 45 of the Disaster Management Act (Act No. 57 of 2002) exposed material discrepancies that could not be ignored.
- 6.7 It is on the basis of the glaring material discrepancies identified during the course of the preliminary investigation that further information and clarity substantiated with relevant documentation was requested from the City of Tshwane and/or its functionaries through a letter dated 13 March 2019 with regard to the following:
- 6.7.1 Whether Mr Govender's qualification was an *Advanced (Associate) Diploma in Fire Technology (NQF 7)* that was equivalent to a bachelor degree as reflected in the in the *Curriculum Vitae*, the *Application for Employment at Tshwane City Form* and the *Senior Manager Assessment Report*; or it was an *Associate Diploma in Fire Technology* with no NQF status/level as reflected in the certificate copy and in the *Personal Credential Verification Report, Verification of Qualification and Background Checks Report*,
- 6.7.2 Whether the *Associate Diploma in Fire Technology* was indeed a three (3) year tertiary qualification that is equivalent to a bachelor degree and awarded to Mr Govender by an accredited higher education institution and if so, to provide documentation and evidence to that effect including the outcome of a valid authentication report from SAQA; and
- 6.7.3 Any other relevant correspondence, documentation, internal memoranda and minutes of meetings that may be relevant in assisting with the conducting of the investigation of the complaint pertaining to the filling of the vacant post of the Chief of Emergency.
- 6.8 The City of Tshwane and/or its functionaries responded to the request through a letter signed by Dr Mosola, dated 8 April 2019 and titled, "*Request for additional information relating to the investigation into allegations of maladministration*,

improper or suspected improper conduct on the appointment of the Chief of Emergency Services” stating amongst others the following:

“Mr Govender’s qualification is stated by the assessment report and his submitted qualification as ‘Associate Diploma in Fire Technology’....The CV provides the detail of what credentials he obtained, the CV is not a qualification nor could replace what is written on the CV as the qualification. The presented qualification and evaluated qualification is Associate Diploma in Fire Technology. The Associate Diploma in Fire Technology is a three year post matric qualification and therefore it was seen to be an equivalent qualification”, and

“We referred to the NQF framework coupled with higher learning institution material to make a determination that any other qualification other than a bachelor’s degree that is also graded at NQF level 7 would be an equivalent qualification”. Associate Diploma in Fire Technology is achieved after practical training on trades and occupation examination. Fire and technology qualifications predates SAQA qualifications criteria. SAESI maintained that Graduate Diploma is achieved after 3 years of study and Associate Diploma is achieved after 4 years of study, the said qualification predates the National Qualification Framework and are not registered on the NQF’.

6.8.1 Despite the above response, the City of Tshwane and/or its functionaries did not submit evidence substantiating the contention that:

6.8.1.1 The *Associate Diploma in Fire Technology* is a three (3) year post matric qualification and therefore it was an equivalent qualification;

6.8.1.2 SAESI’s response that the Graduate Diploma is achieved after three (3) years of study and Associate Diploma is achieved after four (4) years of study and whether SAESI was an accredited higher learning institution; and

6.8.1.3 No credible compelling reasons were advanced as to why Mr Govender referred to his *Associate Diploma in Fire Technology* as an *Advanced (Associate) in Fire Technology NQF 7*. In addition the City of Tshwane maintained its assumption that the *Associate Diploma in Fire Technology* was

seen as equivalent qualification without having it evaluated/graded to determine if it was equivalent to a bachelor degree.

6.8.2 The response from the City of Tshwane was accompanied with a copy of a report titled, *Final Forensic Investigation Report: Verification of Qualification of Senior Officials (Chief of Emergency Services)* signed by Mr Ntsimane, the Chief Audit Executive and dated 31 October 2016. The report was an outcome of an investigation conducted into the suitability of Mr Govender's qualifications for appointment to the post of Chief of Emergency. The findings in the report were amongst others that:

6.8.2.1 Mr Govender's citation in the *Curriculum Vitae* of his qualification as "Advanced Associate Diploma NQF 7" was incorrect as it is seen as an attempt to elevate his qualification and make it fit for purpose. The attempted elevation of his qualification to "NQF 7" may have influenced his selection notwithstanding the required verification;

6.8.2.2 The Human Capital Management and the appointed Consultancy failed to validate and verify the qualification; and

6.8.2.3 Mr Govender's qualification was not accredited/evaluated by SAQA.

6.8.3 The report recommended amongst others that the City of Tshwane and/or its functionaries:

6.8.3.1 Obtain a legal opinion on how to remedy the appointment of Mr Govender meanwhile his qualification was non-compliant with SAQA qualification requirements;

6.8.3.2 Consider taking disciplinary action against Mr Govender for wrongfully referring to his qualification in the *Curriculum Vitae* and the *Application for Employment at City of Tshwane Form* as an "Advanced Associate

Diploma NQF 7” which misled the recruitment process about the suitability of his qualification; and that

- 6.8.3.3 Prior to finalisation of the recruitment process, the Human Capital Management should check and confirm the legitimacy of qualifications as well as their NQF Level status.
- 6.8.4 As the *Final Forensic Investigation Report: Verification of Qualification of Senior Officials (Chief of Emergency Services)* was signed on 31 October 2016, it would appear that prior to the complaint being received by the Public Protector on 27 September 2018, the City of Tshwane and/or its functionaries were aware of the findings and recommendations contained in the report but had not acted on it.
- 6.8.5 In addition, the City of Tshwane’s response dated 12 February 2019 and titled, *Investigation into allegations of maladministration, improper or suspected improper conducting relating to the appointment of the Chief of Emergency Services*, signed by Dr Mosola, omitted to either mention the report or submit a copy as it had been requested that it should substantiate its response by submitting all documentation, information, minutes, memos and any other information and documentation that would assist in the investigation of the complaint relating to the appointment of Mr Govender.
- 6.8.6 The City of Tshwane was selective in its submission of information and documentation that had a bearing on the investigation being conducted which can be viewed as conduct by an organ of state not assisting the Public Protector to be effective as stipulated in the Constitution, 1996.⁴

⁴ Section 181(3) of the Constitution provide as follows: “*Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.*”

6.8.7 The *Final Forensic Investigation Report: Verification of Qualification of Senior Officials (Chief of Emergency Services)* was accompanied by annexures of the following documentation:

6.8.7.1 Copy of sworn *Affidavit* by Mr Govender dated 5 September 2018 in which he stated amongst other that:

6.8.7.1.1 His appointment in the post of Chief Emergency was made in terms of section 45 of the Disaster Management Act and section 5(1) of the Fire Brigades Services Act;

6.8.7.1.2 He obtained the *Advanced (Associate) Diploma in Fire Technology (NQF 7)* from SAESI in June 1996 as reflected in his *Curriculum Vitae* and *Application for Employment at City of Tshwane Form*;

6.8.7.1.3 The *Associate Diploma in Fire Technology* was also named the *National Higher Diploma in Fire Technology* and later changed to *Advanced Associate Diploma in Fire Technology*;

6.8.7.1.4 He wrote *Advanced (Associate) Diploma in Fire Technology* as indicated in his *Curriculum Vitae* to clear confusion that might be encountered by HR who may not be familiar with the name change of the *Associate Diploma in Fire Technology*; and

6.8.7.1.5 He does not know if the *Associate Diploma in Fire Technology* was equivalent to a bachelor degree however, the Human Science Research Council evaluated the *Associate Diploma in Fire Technology* as equivalent to M+3 and it was therefore his assumption that the *Associate Diploma in Fire Technology* was equivalent to the NQF 7 and as informed by a recent job advertisement of the City of Joburg.

6.8.8 In another copy of a sworn *Affidavit* deposed by Ms Helena Andriana Zaayman, the Senior HR Acquisition Specialist-Group Capital Management for the City of Tshwane dated 10 September 2018 it is stated amongst others that;

6.8.8.1 Mr Govender met the appointment requirements for the post of Chief of Emergency as informed by the qualification he indicated in his application namely the *Associate Diploma in Fire Technology*; and

6.8.8.2 The *Associate Diploma in Fire Technology* is equivalent to a bachelor degree as it is a three (3) year post matric qualification and was therefore an equivalent qualification.

6.8.9 A copy of an e-mail dated 17 August 2018 addressed to J Samuels of SAQA, from Ms Salome van den Berg, the Chief Executive Officer of Southern African Emergency Services Institute Ms Salome van den Berg stated as follows:

“I need to re-iterate that the SAESI education programmes for its members known as the Fire Technology is for members only and is not registered on the NQF and SAESI therefore does not advocate that any of the programmes is of a NQF ‘value’”

6.8.9.1 Meanwhile in the letter from *Southern African Emergency Services Institute* dated 28 August 2018 addressed to Mr Mankopane Mlolawa, Senior Forensic Investigator-Forensic Service for the City of Tshwane it is stated amongst others as follows:

“The upper level of this qualification was offered by the National College Limited (T/A Success College) from 1994 to 2003 where distance learning was provided by Success College and examination questions was generated by SAESI and administered by Success. Successful students were then awarded the SAESI certificates. This appears the element of scrutiny and it’s aligned to the NQF”.

6.8.10 In a copy of letter dated 7 September 2018 and signed by Mr Joe Samuels, the Chief Executive Officer of SAQA addressed to Mr Mankopane Mmolawa, Senior Forensic Investigator-Forensic Service for the City of Tshwane it is stated that:

6.8.10.1 SAESI was recognised as a Professional Body from 6 December 2017 and have registered the Firefighter Practitioner SA (FFP (SA) as a professional designation. Professional Bodies do not issued certificates or qualifications.

6.9 In the case of *The Public Protector v Mail & Guardian Ltd* (422/10)[2011] ZASCA 108 the court held that:

[9] The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances.

[11] But although the conduct that may be investigated is circumscribed, I think it is important to bear in mind that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. The Act confers upon the Public Protector sweeping powers to discover information from any person at all.... Those powers emphasise once again that the Public Protector has a pro-active function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance but is enjoined to actively discover the truth.

6.9.1 It is on the basis of the above court judgement and the apparent material discrepancies and inconsistencies on the information submitted by the City of Tshwane and/or its functionaries relating to the status of Mr Govender's *Associate Diploma in Fire Technology*, that the investigation team requested information from the City of Ekurhuleni where he previously held the position of Divisional Head: DEMS Strategy and Planning prior to him being appointed by the City of Tshwane.

- 6.9.2 The City of Ekurhuleni submitted copies of Govender's *Qualification and Training Form, Curriculum Vitae and Associate Diploma in Fire Technology*.
- 6.9.3 The copy of *Curriculum Vitae and Qualification and Training Form* reflect the highest qualification of Govender as a *National Higher Diploma in Fire Technology (NQF 6)* obtained in June 1996 from SAESI.
- 6.9.4 The City of Tshwane and/or its functionaries later submitted a copy of a report dated 31 October 2019 and signed by Mr Ntsimane in his capacity as Chief Audit Executive: Group Audit and Risk Department titled, *Report on Misrepresentations Made by a Section 56 Manager with regard to Qualifications and Proposals for Corrective Measures to be followed*.
- 6.9.5 The purpose of the report was to inform the Tshwane Municipal Council of the legal opinions obtained with regard to allegations of misrepresentation of qualifications by Mr Govender when applying for post of Chief of Emergency in the City of Tshwane and for approval of the proposed corrective measures to be followed.
- 6.9.6 The conclusion in the report as per the legal opinions sought was that:
- "Mr Govender misrepresented facts in his CV that he has a NQF level 7 qualification and as he does not meet the requirement for the position for the Chief of Emergency in the City of Tshwane, his contract of employment is null and void. The City will now embark on corrective measures"*.
- 6.9.7 The recommendations made in the report are that:
- 6.9.7.1 The Council notes the report on the misrepresentation made by a section 56 Manager with regard to qualifications and proposals for consequence management;
- 6.9.7.2 The Council concurs with the findings that Mr Govender misrepresented facts on his application form and CV;

- 6.9.7.3 The Acting City Manager be instructed to address a letter to Mr Govender stating that the City is of the view that he misrepresented his qualifications to the Council when he applied for the position of Chief of Emergency for the City of Tshwane, and that due to the fact that he does not meet the qualification requirements for the said position, his contract of employment was null and void;
- 6.9.7.4 Mr Govender be allowed seven (7) calendar days, from the date of the letter to persuade the City of Tshwane that the contract of employment was not null and void and that he had the necessary qualifications when he applied;
- 6.9.7.5 The Executive Mayor, in consultation with the Acting City Manager be authorized to consider any submission made by Mr Govender as contemplated in 8.3 above;
- 6.9.7.6 In the event of Mr Govender not being able to persuade the City of Tshwane as contemplated in 8.3 above, the Acting City Manager be authorized to institute corrective measures and legal proceedings against Mr Govender, declaring his contract of employment null and void and recovering all moneys paid to Mr Govender in terms of the invalid contract;
- 6.9.7.7 The Executive Mayor submit a report to a special or ordinary council on actions taken as contemplated above in 8.4; 8.5 and 8.6.
- 6.9.8 Accompanied with *Report on Misrepresentations Made by a Section 56 Manager with regard to Qualifications and Proposals for Corrective Measures to be followed*, where copies of two legal opinion from by Ngoato Attorneys dated 15 October 2019 and by Adv GI Hulley obo Diale Mogashoa dated 2 October 2019 respectively.

6.9.9 The legal opinion by Ngoato Attorneys titled: *Legal Opinion: Alleged Misrepresentation by Previn Govender when he Applied for a Job of Chief of Emergency* found amongst others that:

6.9.9.1 Mr Govender's qualifications did not meet the total sum of the requirements equivalent to a bachelor degree required for appointment in the post of Chief of Emergency;

6.9.9.2 Mr Govender was full aware of the requirements for the post of Chief of Emergency and that he did not have an *Advanced Diploma in Fire Technology (NQF 7)*; and

6.9.9.3 The inclusion of the word "*Advanced and NQF 7*" was both false, misleading and amounted to misrepresentation, hence it can be concluded that Mr Govender misrepresented himself when he applied for the post of Chief of Emergency at the City of Tshwane.

6.9.10 The legal opinion by *Adv GI Hulley obo Diale Mogashoa* found amongst others that:

6.9.10.1 Mr Govender made at least two misrepresentations, first one was made in the *Application Form* when he stated that he had an *Advanced Diploma in Fire Technology* while he had an *Associate Diploma in Fire Technology*. The second misrepresentation was made in both his *Curriculum Vitae* and *Application Form* by stating that his *Associate Diploma in Fire Technology* was *NQF 7*; and

6.9.10.2 Mr Govender did not have the equivalent of a bachelor degree on appointment in the post of Chief of Emergency as stipulated in the *Job Advertisement*, therefore the contract of employment entered into was null and void.

6.10 Response to the section 7(9)(a) Notice:

- 6.10.1 Notices in terms of section 7(9) of the Public Protector Act, 1994 were served on the City of Tshwane addressed to Mr Ntsimane on 15 October 2019, Mr Govender on 15 October 2019 and Councillor D Kissoonduth on 11 February 2020.
- 6.10.2 The other Selection Panel members namely Dr Mosola, Councillor C Brink, Councillor I Pietersen and Ms P Yako could not be traced and hence they were not served with copies of the section 7(9) notice.
- 6.10.3 In its response signed by the then Acting Municipal Manager, Mr Ntsimane and dated 18 October 2019 to the section 7(9) notice, the City of Tshwane stated that:
- 6.10.3.1 It cannot factually dispute any of the investigative facts that were verified than concur with the preliminary findings and remedy the situation upon receipt of the final report of the Public Protector. However, it does not agree with findings of maladministration on its part. If there was any improper conduct found it should have been committed by a staff member from the Human Capital Department who was appointed to provide advisory service during the recruitment process. In the interim, an administrative process based on the preliminary findings and other information available has been initiated as part of the process of addressing the matter;
- 6.10.3.2 Regulation 14(1)(c) of the Regulation, 2014 states that the screening of the shortlisted candidates must include '*determining the validity of a candidate's qualifications*' and therefore the Regulations do not state that the City of Tshwane is duty bound to concur with SAQA prior making an appointment;

- 6.10.3.3 Managed Integrity Evaluations (Pty) Ltd was appointed to assist the City of Tshwane with the screening of the qualifications and it confirmed the validity of Mr Govender's qualification;
- 6.10.3.4 Mr Govender did not claim to have a qualification he did not have except the issue of NQF level 7 which was not an expressed requirement for the post;
- 6.10.3.5 The submission made by SAESI relating to the firefighting industry must be considered to ensure that the Public Protector considers all necessary documentation at its disposal before arriving at a final conclusion.
- 6.10.3.6 Dr Mosola met with Mr Govender on the NQF level inscription on the *Curriculum Vitae and Application for Employment at City of Tshwane Form* and it was explained by Mr Govender that the qualification was not NQF level 7, the inscription was practice in the industry informed by the HSRC comparisons, and recent City of Joburg's advertisement and other Metros. It was accepted that Mr Govender has made a "*mistaken comparison*" and no further action was needed; and
- 6.10.3.7 The Group Head: Group Legal and Secretariat Services has been instructed to solicit a legal opinion with regard to the allegations.
- 6.10.4 The above response from City of Tshwane and/or its functionaries is not persuasive in that:
- 6.10.4.1 In the report titled *Final Forensic Investigation Report: Verification of Qualification of Senior Officials (Chief of Emergency Services)* dated 31 October 2016 signed by Mr Ntsimane in his capacity as the Chief Audit Executive it was found amongst others that, the citation by Mr Govender that his qualification was an *Advanced (Associate) Diploma in Fire Technology NQF 7* was misleading and incorrect and it was recommended that action be taken against Mr Govender;

- 6.10.4.2 The response from Mr Ntsimane in his capacity as the then Acting Municipal Manager to the section 7(9) notice, was an about turn from the findings and recommendations he signed off in the *Final Forensic Investigation Report: Verification of Qualification of Senior Officials (Chief of Emergency Services)* dated 31 October 2016. It would have been expected that as he was the then Acting Municipal Manager when the section 7(9) notice was served on him, he should have been in a position to implement the recommendations in the report he signed off;
- 6.10.4.3 It was presented in the section 7(9) notice that Mr Govender claimed to have a *Higher National Diploma in Fire Technology (NQF 6)* when applying for a post of Divisional Head: DEMS Strategy and Planning at the City of Ekurhuleni, while on the other hand, he claimed to have an *Advanced (Associate) Diploma in Fire Technology (NQF 7)* when applying for the post of Chief of Emergency at the City of Tshwane;
- 6.10.4.4 SAESI has already submitted that its qualifications were issued to its members and are not registered with SAQA and have no NQF value as it was not an accredited higher education institution rather it was registered with SAQA as a Professional Body;
- 6.10.4.5 SAESI did not award an *Advanced Associate Diploma in Fire Technology (NQF 7)* or a *Higher National Diploma in Fire Technology (NQF 6)* as presented by Mr Govender.
- 6.10.4.6 In this regard, the *MEI Qualification Verification Report* confirmed that Mr Govender was in possession of an *Associate Diploma in Fire Technology* and not an *Advanced Associate Diploma in Fire Technology* as he claimed in the *Curriculum Vitae and Application for Employment at City of Tshwane Form*.
- 6.10.4.7 It is therefore incorrect for Mr Ntsimane to contend that Mr Govender did not claim to have a qualification he did not possess while in the report he signed

off as Chief Audit Executive it was found that the claim by Mr Govender that he was in possession of an *Advanced Associate Diploma in Fire Technology (NQF 7)* materially influenced the Selection Panel to select him. Referring to the recent advertisement by City of Joburg is maliciously negligent of the seriousness of the allegations under investigation.

6.10.5 Upon receipt of the section 7(9) notice, Mr Govender requested an extension of ten (10) working days in order to “*formulate a meaningful reply*” to the notice through letters dated 16 October 2019 and 22 October 2019 respectively. He was granted an extension of seven (7) days to respond to the section 7(9) notice in a letter dated 25 October 2019 in terms of Rule 24(3) of the Public Protector Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018.

6.10.6 Following the granting of the extension, correspondence was received from Muthray & Associates Incorporated acting on behalf of Mr Govender stating amongst others that:

6.10.6.1 The findings in the section 7(9) notice were incorrect both in law and in fact;

6.10.6.2 Mr Govender was the most suitable candidate for appointment based on the interview scores;

6.10.6.3 The finding that Mr Govender attempted to present comparability given qualifications, are factual incorrect and can be clarified in a meeting that is being requested to present the information;

6.10.6.4 The Complainant who lodged the complaint should have exhausted internal remedies available to him or her prior to lodging the complaint with the Public Protector. The Public Protector should have refused to investigate the complaint on that basis. Alternatively, the Complainant should have attempted

to review and set aside the appointment of Mr Govender or file an internal grievance if they so wished.

6.10.6.5 The intervention by the Public Protector on the matter at this point in time would be irregular and unreasonable as it renders the provisions of the Labour Relations Act of 1995 nugatory and prejudicial to Mr Govender; and

6.10.6.6 The Public Protector is requested to inform the Complainant about the alternative remedies and that he/she was required to exhaust them and thereafter inform Muthray & Associates Incorporated. Based on the response received from the Public Protector a decision will be made on whether to arrange a meeting or not.

6.10.7 The letter from Muthray & Associates Incorporated was responded to on 07 November 2019 stating amongst others that:

6.10.7.1 The purpose of the section 7(9) notice was to afford a party subject to an investigation an opportunity to respond or rebut any allegation or preliminary finding against them and the findings in their nature were preliminary pending receipt of evidence from Mr Govender to rebut them;

6.10.7.2 The request for a meeting for the purpose of giving Mr Govender an opportunity to provide evidence to rebut the allegations was welcome;

6.10.7.3 The request to accede to section 6(3) of the Public Protector Act, 1994 was not accepted as it is the discretion of the Public Protector to decide and advise a Complainant to exhaust internal remedies and the Public Protector has exercised her discretion correctly in terms of the law to conduct an investigation into the matter; and

6.10.7.4 The Public Protector cannot be prevented from issuing a report on basis that one party to an investigation feels aggrieved, and therefore Muthray &

Associates Incorporated is requested to advise its client to respond to the allegations substantially.

6.10.7.5 On 19 November 2019 an e-mail was sent to Mr Govender informing him that his response to the section 7(9) notice has not yet been received and he was requested to file his response.

6.10.8 Upon serving Muthray & Associates Incorporated with the copy of the above letter and forwarding an e-mail to Mr Govender dated 19 November 2019, no further response was received.

6.10.9 In his response to the section 7(9) notice dated 11 February 2020, Councilor D Kissoonduth stated amongst others that:

6.10.9.1 He was not involved in the finalisation of the advertisement as well as the shortlisting of the post of Chief of Emergency;

6.10.9.2 He became aware of the interviews taking place a day before the event when notified by Dr Mosola to avail himself for the interview as a Selection Panel member as the post was in his portfolio;

6.10.9.3 A service provider was required to verify the authenticity of the interviewed candidates' qualifications, service history and references; and

6.10.9.4 The Selection Panel recommend a suitable candidate for appointment by the Tshwane Municipal Council which approved the appointment.

6.10.10 Considering the above response from Councilor D Kissoonduth, it has been established that his name appeared in the minutes of Selection Panel members present during the shortlisting and interview. Should Councilor D Kissoonduth not been present during the shortlisting for the post of Chief of Emergency then, the Selection Panel did not quorate during the shortlisting process.

7 The evidence received and obtained during the course of the investigation, including responses to section 7(9) notices was carefully assessed and evaluated in order to establish on a balance of probability, whether there was maladministration and improper conduct by the City of Tshwane and/or its functionaries with regard to the appointment of Mr Govender in the post of Chief of Emergency was as follows:

7.1 The *Job Advertisement* for the post of Chief of Emergency closed on 20 March 2017. The Selection Panel finalised the shortlisting of candidates on 2 May 2017 almost on day 42 after the closing date of the advertisement. The shortlisting of candidates should have been finalised within thirty (30) days from the closing date of the advertisement of the post as stipulated in Regulation 13.⁵ In this case the shortlisting of candidates was finalised twelve (12) days late;

7.2 In the copy of *Curriculum Vitae*, the *Application for Employment at City of Tshwane Form* and *Senior Manager Competency Assessment Report*, it is reflected that Mr Govender is in possession of an *Advanced Associate Diploma in Fire Technology (NQF 7)*.⁶ However, evidence from SAESI and the *MEI*

⁵ Regulation 13 provides as follows amongst others with regard to timeframe upon which the shortlisting should be finalized:

(1) The shortlisting must be finalized within 30 days of the closing date of the advertisement.

Clause 5.3 of the Staffing Policy provides as follows with regard to shortlisting of candidates:

5.3.1 The Department in which the advertised vacancy exists, together with Strategic Human Resources Division, are responsible for the shortlisting.

5.3.2 The relevant Department and the Strategic Human Resources Division (Staffing Services and Management Section) evaluate all applications received for a specific position against the actual job requirements of the position as reflected in the person specification, such as qualifications, experience and skills.

5.3.4 A pre-selection interview may be conducted to verify information concerning qualifications, knowledge and experience, and it must be conducted in a structured way. The composition of the panel must be reasonably representative of all stakeholders.

5.3.5 Candidates who meet the minimum appointment requirements may be considered for further assessment/evaluation; the others are eliminated from the process, except in cases of special merit in terms of any collective agreements.

⁶ Regulation 9(2) provides as follows with regard to qualifications of a person to be appointed in the position of a senior manager:

(2) A person appointed as a senior manager in terms of these regulations must comply with the minimum requirements for **higher education qualification**, work experience and knowledge as set out in Annexure

Qualification Verification Report established that SAESI did not award an *Advanced Associate Diploma in Fire Technology (NQF 7)* to Mr Govender rather he was awarded with an *Associate Diploma in Fire Technology* in June 1996. SAESI was registered with SAQA as a Professional Body and not as an accredited higher learning institution;

7.3 Mr Govender made a false declaration in the *Application for Employment at the City of Tshwane Form*,⁷ by stating that his highest tertiary/technical qualification was an *Advanced Associate Diploma in Fire Technology (NQF 7)* while referring to the *Associate Diploma in Fire Technology* which was neither an *Advanced Diploma* nor graded at NQF 7. Mr Govender was therefore aware and understood that the information he provided in the *Application for Employment at City of Tshwane Form*, his *Curriculum Vitae* and the *Senior Manager Competency Assessment Report* claiming that his qualification was an *Advanced Associate Diploma in Fire Technology (NQF 7)* was neither true nor correct;

7.3.1 The *MIE Verification Report* reflect the name of the qualification/tertiary course that was submitted for verification as an *Advanced Diploma in Fire Technology*, however, the verification process established that Mr Govender was awarded an *Associate Diploma in Fire Technology* by SAFSI in 1996, student/certificate number: MO 03146 and not an *Advanced Associate Diploma in Fire Technology* as he claimed. In this regard the *MIE Verification Report* picked up material discrepancies which had the potential of being fraudulent in that the name of the qualification submitted for verification was different from what was found after the verification process. Therefore, the test results detected a false claim on the part of the qualification that Mr Govender claimed to possess.

B. The education qualification requirements for appointment as set in Annexure B relating to **other senior managers** is “*A relevant Bachelor Degree or equivalent*”.

⁷ Regulation 11 provides as follows with regard to submitting and recording of applications for a vacant post of senior manager:

(1) An application for the vacant post of a senior manager must be submitted on an official application form, attached as Annexure C, accompanied by a detailed curriculum vitae.

- 7.4 The *Minutes: Selection Panel Meeting for Appointment of Chief of Held in Pretoria on 2 May 2017* stated that Ms R Zaayman explained that everyone had to fill and sign the declaration documents before the process started.⁸ No evidence was submitted establishing that all Selection Panel members and any other person present signed and submitted declaration documentation prior to or after the deliberations of the meeting neither was there evidence submitted to establish that Selection Panel members present signed an Attendance Register to that effect. In this regard, it could not be established that the Selection Panel members present formed the required quorum to conduct the shortlisting considering the contention by Councilor D Kisoonduth⁹ in his response to the section 7(9) notice that he was not present during the shortlist, rather he was present during the interview process;
- 7.5 In the *Minutes of the interview panel for interviews of the post of Chief of Emergency, held in Johannesburg on 23 May 2017*, it is reported that the Selection Panel members present during the interview were provided with relevant information for each candidate namely, the application, assessment report, reference checks and other vetting documents. However, it does not appear that the Selection Panel members carefully considered the outcome of the *MIE Verification Report* against the information submitted by Mr Govender in the *Application for Employment at City of Tshwane*, his *Curriculum Vitae* in which he claimed to possess an *Advanced Associate Diploma in Fire Technology NQF 7* whereas he was awarded an *Associate Diploma in Fire Technology* without any NQF value;

⁸ Regulation 12(7) of the Regulations, 2014 provides that:
“A panel member and staff member must sign, a declaration of confidentiality as set out in Annexure D to these regulations, to avert the disclosure of information to unauthorized persons”.

⁹ Regulation 12(4) of the Regulations, 2014 provides that:
The selection panel for the appointment of a manager directly accountable to the municipal manager must consist of at least three and not more than five members constituted as follows:

- (a) Municipal manager, who will be the chairperson;
- (b) A member of the mayoral committee or councilor who is the portfolio head of the relevant portfolio;
and
- (c) At least one other person, who is not a councilor or a staff member of the municipality, and who has expertise in the area of the advertised post.

In the above instance, the City of Tshwane submitted that Councilor D Kisoonduth was a member of the mayoral committee in whose portfolio the post of Chief of Emergency was located.

- 7.6 In the *Special Council: 29 June 2017: Appointments in the position of Governance and Support Officer, Chief Operations Officer, Chief Audit Executive, Chief of Emergency, Group Head, Group Communication and Marketing and Group Head: City Strategy and Organisational Performance*, it is stated that the report was presented in the Tshwane Municipal Council requesting approval for the appointment of interviewed candidates in the post of senior managers directly accountable to the Municipal Manager.¹⁰ The request in the report was approved. However, the minutes do not record how the Tshwane Municipal Council satisfied itself that the recommended candidate meet all the requirements for appointment in the post of Chief of Emergency, considering that the qualification presented by Mr Govender was neither a bachelor degree nor equivalent qualification.¹¹
- 7.7 Further thereto, *MIE Verification Report* reflected that he was in possession of an *Associate Diploma in Fire Technology* whose NQF was unknown and not an *Advanced Associate Diploma in Fire Technology NQF 7* as he stated in the application;
- 7.8 The contention by Mr Govender in his *Affidavit* that he was appointed in the post of Chief Emergency in terms of section 45 of the Disaster Management Act and section 5(1) of the Fire Brigades Services Act, is not true as it will be reflected later in this report under applicable legislative framework;

¹⁰ Regulation 16(5) of the Regulations, 2014 provides as follows:

The selection panel must submit a report and recommendation on the selection process to the municipal council on the suitability of candidates who comply with the relevant competency requirements of the post as set out in Annexure A and B in order of preference.

¹¹ Regulation 17(1) of the Regulations, 2014 provides as follows:

Before making a decision on an appointment, a municipal council must satisfy itself that-

- (a) the candidate meets the relevant competency requirements for the post, as set out in Annexures A and B to these regulations;
- (b) screening of the candidates has been conducted in terms of regulation 14; and
- (c) candidate does not appear on the record of staff members dismissed for misconduct as set out in Schedule 2 to these regulations.

It is further provided in Regulation 17(2) that: *“A municipal council must, subject to subregulation (1) take a decision on the appointment of a suitable candidate”*. In this regard, the City of Tshwane Municipal Council took a decision to appoint Mr Govender to the *post of Chief of Emergency despite the glaring material discrepancies with regard to information about his qualification not being a competent qualification as defined in the Regulations*.

- 7.9 While Mr Govender stated in his *Affidavit* that he did not know if the *Associate Diploma in Fire Technology* was equivalent to a bachelor degree, rather it was his assumption that the *Associate Diploma in Fire Technology* was equivalent to the NQF 7, he should not have written in his *Curriculum Vitae* and the *Application for Employment at City of Tshwane Form* that it was an *Advanced Associate Diploma in Fire Technology on NQF 7* and declared that the information was true and correct;
- 7.10 Mr Govender's contention that the *Associate Diploma in Fire Technology* changed its name to *National Higher Diploma in Fire Technology* and later to the *Advanced Associate Diploma in Fire Technology* was neither supported with evidence nor confirmed by SAESI in its correspondence with Mr Mankopane Mmolawa, Senior Forensic Investigator-Forensic Service for the City of Tshwane;
- 7.11 Should Mr Govender wished to explain and clear confusion with regard to the *Advanced (Associate) Diploma in Fire Technology* as indicated in his *Curriculum Vitae* and *Application for Employment at City of Tshwane Form* he should have written a separate letter or motivation to that effect;
- 7.12 Ms Zaayman's *Affidavit* contradict the findings contained in the *Forensic Report* conducted by the City of Tshwane and two legal opinions which found that Mr Govender was not qualified for the post as his *Associate Diploma in Fire Technology* was not equivalent to a bachelor degree. Further thereto, Mr Govender indicated in the application that his highest qualification was an *Advanced Associate Diploma in Fire Technology (NQF 7)* which he did not have while Ms Zaayman stated in her *Affidavit* that Mr Govender indicated in the application that his highest qualification was an *Associate Diploma in Fire Technology*;
- 7.13 In addition, SAESI stated that its education programmes are for its members only and are not NQF graded. In other words, the *Associate Diploma in Fire Technology* is only issued to SAESI members hence it can be regarded as a "membership certificate" rather than being a qualification.

7.14 Mr Govender never mentioned the name of the college that he attended in order to obtain the *Associate Diploma in Fire Technology*. It has been presented by the City of Tshwane, Ms Zaayman and Mr Govender as if SAESI offered the training as a learning institution and issued the certificate upon completion, whereas SAESI set the examinations which were administered by Success College. In other words, the training was conducted by Success College and SAESI awarded the certificate upon completion of the education programme by its members. Therefore the claim by Mr Govender in his *Affidavit*, Ms Zaayman's *Affidavit* and by City of Tshwane that he was qualified for appointment as the *Associate Diploma in Fire Technology* was seen as a three (3) year qualification equivalent degree is unsustainable.

Conclusion

7.15 It has been established in the evidence that Mr Govender was awarded an *Associate Diploma in Fire Technology* by SAESI in June 1996 with no NQF level value and not the *Advanced Associate Diploma in Fire Technology NQF level 7* or *Higher National Diploma in Fire Technology NQF level 6* as he claimed. SAESI is registered with SAQA as a Professional Body and does not issue higher education qualifications. The evidence further reveals that despite the Selection Panel being aware of the material discrepancies with regard to the status of the qualification submitted by Mr Govender, it continued with the recruitment process as if all was above board.

9 Application of relevant legal framework

9.1 The Constitution

9.1.1 Section 195(1) of the Constitution, 1996 provides that:

“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*
- (d) Services must be provided impartially, fairly, equitably and without bias.*
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) Good human-resource management and career-development practices, to maximize human potential, must be cultivated.*
- (i) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (j) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*

9.1.2 Considering the above provisions of the Constitution, 1996 and the evidence presented, a *high standard of professional ethics, efficient, economic and effective use of resources must be promoted and employment and personnel management practices based on ability, objectivity, fairness* was not promoted by the City of Tshwane and/or its functionaries during the shortlisting, interviewing and appointing Mr Govender in the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as

stipulated in the *Job Advertisement* for the post and required in terms of section 56 of the Municipal Systems Act, 2000.

9.2 The Labour Relations Act 66 of 1995

9.2.1 Section 186(2) of the Labour Relations Act, 1995 provides as follows:

“(2) **‘Unfair labour practice’** means any unfair act or omission that arises between an employer and an employee involving-

(a) *Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee”.*

9.2.2 Considering the above provisions of the Labour Relations Act, 1995, the appointment of Mr Govender in the post of Chief of Emergency with an annual salary of between R 1 2196663.00 to R 1 829495.00 without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* and section 56 of the Municipal Systems Act, 2000 with only a Matric Certificate as his highest formal qualification and a Driving License amounts to unfair labour practices by the City of Tshwane and/or its functionaries on the grounds of promoting, training of an employee or the provision of benefits to an employee who did not qualify for the promotion and benefits consummate with the post of Chief of Emergency.

9.3 Municipal Systems Act 32 of 2000 [as amended by the Municipal Systems Amendment Act, 2011],

9.3.1 Section 56(1) of Municipal Systems Act, 2000 provides as follows with regard to qualifications required for appointment of senior managers directly reporting the Municipal Manager:

- (1) (a) *A municipal council, after consultation with the municipal manager, must appoint-*
 - (i) *a manager directly accountable to the municipal manager;*
or
 - (ii) *an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.*
- (b) *A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed.*
- (2) *A decision to appoint a person referred to in subsection (1)(a)(ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-*
 - (a) *the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or*
 - (b) *the appointment was otherwise made in contravention of this Act, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).*
- (3) *If a post referred to in subsection (1)(a)(i) becomes vacant, the municipal council must-*
 - (a) *advertise the post nationally to attract a pool of candidates nationwide; and*
 - (b) *select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.*
- (4) *...;*
- (5) *If a person is appointed to a post referred to in subsection (1)(a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may*

include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council.

- (6) *A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (1)(b) if it is unable to attract suitable candidates”.*

9.3.2 Considering the above provisions of the Act and the evidence presented it has been established that Mr Govender was shortlisted, interviewed, recommended for appointment and eventually appointed in the post despite him not complying with the prescribed requirements stipulated for appointment in a senior manager post. The Regulations, 2014 define “**competence**” as *meaning having the necessary higher education qualification, work experience and knowledge to obtain at least a competent level of achievement.*

9.4 Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers of 17 January 2014

9.4.1 Regulation 8 relating to the Recruitment, Selection and Appointment provides as follows:

- (1) *No person may be appointed as a senior manager on a fixed term contract, on a permanent basis or on probation, to any post on the approved staff establishment of a municipality, unless he or she-*
- (a) *is a South African citizen or permanent resident; and*
 - (b) *Possesses the relevant competencies, qualifications, experience, and knowledge set out in Annexure A and B to these regulations.*

9.4.2 Regulation 9 relating to the Recruitment, Selection and Appointment provides as follows:

- (1) *A person appointed as a senior manager in terms of these regulations must have the competencies as set out in Annexure A.*

- (2) *A person appointed as a senior manager in terms of these regulations must comply with the minimum requirements for higher education qualification, work experience and knowledge as set out in Annexure B.*

9.4.3 Annexure A and B of the Regulations relating to the Minimum Competency Requirements for Senior Managers stipulates the higher education, the level of experience and work-related experience required for appointment of senior managers directly accountable to the municipal manager as follows:

9.4.3.1 A relevant bachelor degree or equivalent;

9.4.3.2 Five years of experience;

9.4.3.3 Good knowledge and interpretation of policy and legislation;

9.4.3.4 Good knowledge of performance management system;

9.4.3.5 Good governance;

9.4.3.6 Good knowledge of supply chain management regulations and the Preferential Procurement Framework Act, 2000 (Act No. 5 of 2000), and

9.4.3.7 Registration with a relevant professional body will be an added advantage.

9.4.4 Considering the above provisions of the Regulations, it has been established that Mr Govender's *Associate Diploma in Fire Technology* is neither a relevant bachelor degree nor equivalent qualification. Hence his appointment to the post of Chief of Emergency was not commensurate with the higher education requirements for the post of a senior manager directly accountable to the municipal manager.

9.5 Municipal Finance Management Act, 2003:

- 9.5.1 The Act defines “**fruitless and wasteful expenditure**” as *means expenditure that was made in vain and would have been avoided had reasonable care been exercised;*
- 9.5.2 Section 32 of the Act deals with *unauthorised, irregular or fruitless and wasteful expenditure* that has been incurred by the municipal in contravention of or as a result of not complying with the provisions of the Act.
- 9.5.3 Considering the above provisions of the Act and the evidence presented, it has been established that the appointment of Mr Govender into the post of Chief of Emergency without him being in possession of relevant bachelor degree or equivalent qualification with an annual salary of R 1 2196663.00 to R 1 829495.00 and other benefits commensurate with the post could have been avoid had the Selection Panel as well as the Tshwane Municipal Council exercised reasonable care by carefully considering the outcome of the MEI Verification Report against the information that was submitted by Mr Govender in the *Curriculum Vitae* and the *Application for Employment at Tshwane City*.

9.6 The Disaster Management Act, 57 (Act 3 of 2002)

- 9.6.1 Section 45 of the Disaster Management Act provides that:

“(1) *A municipal council must subject to the applicable provisions of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), appoint a person as head of its municipal disaster management centre*”.

- 9.6.2 Considering the above provisions of the Act, it is evident that the appointment of a person as Head of the Disaster Management Centre is subject to the Municipal

Systems Act. The contention by the City of Tshwane and its functionaries in its response that the Disaster Management Act does not provide for the requirements for the appointment of Chief of Fire/Emergency is misplaced.

9.7 The Higher Education Qualifications Framework HIGHER EDUCATION ACT, 1997 (Act No. 101 of 1997)

9.7.1 The Act defines a qualification as follows:

“A qualification” is the formal recognition and certification of learning achievement awarded by an accredited institution. The South African Qualifications Authority (SAQA) stipulates that the learning outcomes of all South African qualifications should include critical cross-field or generic skills to promote lifelong learning as well as discipline, domain-specific or specialised knowledge, skills and reflexivity. The format for qualification specification, where appropriate, should include the title and purpose of the qualification, its NQF level, credits, rules of combination for its learning components, exit-level outcomes and associated assessment criteria, entry requirements, forms of integrated assessment, and arrangements for the recognition of prior learning and for moderation of assessment. The recognition of prior learning should enable potential students, including those who had suffered disadvantage in the past to be admitted to particular higher education programmes depending on their assessed knowledge and skills.

9.7.2 Considering the above definition of a “**qualification**”, the evidence presented established that the *Associate Diploma in Fire Technology* is not a qualification for purpose of employment in terms of section 56 of the Municipal Structures Act. SAESI submitted that the *Associate Diploma in Fire Technology* has no NQF value and discourages its members from attaching any NQF value to its qualifications. In this regard the contention by the City of Tshwane that the *Associate Diploma in Fire Technology* was seen as equivalent qualification is unsustainable.

9.8 National Qualifications Framework Act, 2008

9.8.1 In terms of section 1 of the Act, a “**national qualification**” means a registered national qualification.

9.8.2 Considering the above definition of a “**national qualification**” evidence has established that the *Associate Diploma in Fire Technology* is not NQF graded/evaluated and therefore it is not a registered national qualification.

9.9 The City of Tshwane Staffing Policy, 2008

9.9.1 Clause 5.2.1 provides as follows:

“Selection criteria must be based on the key performance areas and inherent requirements of the position and must be applied consistently”.

9.9.2 Clause 5.2.4 provides as follows:

“A candidate is considered suitably qualified for appointment based on one or a combination of amongst others following aspects:

9.9.2.1 *Formal qualifications;*

9.9.2.2 *Recognition of prior learning;*

9.9.2.3 *Relevant experience;*

9.9.2.4 *The ability to perform the job; and*

9.9.2.5 *The capacity to acquire, within a reasonable time, the ability to perform the tasks.*

9.9.3 Clause 17.1 provides as follows:

“If a candidate has already commenced with his/her duties and it is later found that the application, CV or qualifications of that person are

fraudulent, he/she will be dismissed, after a fair process has been followed”.

9.9.4 Considering the above provisions of the City of Tshwane Staffing Policy, 2008 and the evidence presented, it has been established that Mr Govender’s claim in the *Application for Employment at City of Tshwane* and his *Curriculum Vitae* that he was in possession of an *Advanced Associate Diploma in Fire Technology (NQF 7)* and a *National Higher Diploma in Fire Technology (NQF 6)* while he was awarded an *Associate Diploma in Fire Technology* by SAESI was false, misleading and a misrepresentation of his qualification which led to his shortlisting, interview and appointment in the post;

9.9.5 Reference and background checks were conducted and the outcome having was made available to the Selection Panel, reflecting that he was awarded an *Associated Diploma in Fire Technology* and not an *Advanced Associate Diploma in Fire Technology* as claimed;

9.9.6 This falsehood and misrepresentation was confirmed by two legal opinions sought by the City of Tshwane, the *Forensic Report* yet no action was taken by the City of Tshwane and/or its functionaries against Mr Govender in compliant with its own policy provisions and applicable legislative prescripts.

9.10 The Public Protector Touchstones:

9.10.1 *Report No.23 of 2013/2014 on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr. Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)*

9.10.2 The Public Protector’s investigation in the above complaint held amongst others that:

“The allegation that Mr Motsoeneng committed fraud by stating in his application form that he had completed matric from Metsimantsho High School is substantiated. By his own admission during his interview, Mr Motsoeneng stated he provided in his application form that he had passed standard 10 (matric), filled in made-up symbols in the same application form and promised to supply a matric certificate to confirm his qualifications. He did so knowing that he had not completed matric and did not have the promised certificate. His blame of Mrs Swanepoel and the SABC management stating that they knew he had not passed matric, is disconcerting. If anything, this defence exacerbates his situation as it shows lack of remorse and ethical conduct. Mr Motsoeneng’s conduct regarding his matric results has been unethical continuously since 1995. The conduct is improper and constitutes a dishonest act as envisaged in 6(4)(a)(ii) and (iii) of the Public Protector Act”.

Conclusion

- 9.11 The evidence presented established that Mr Govender was awarded with an *Associate Diploma in Fire Technology* from SAESI in June 1996 with no NQF level value and not the *Advanced Associate Diploma in Fire Technology NQF level 7* as he claimed. Despite the Selection Panel being aware of the material discrepancies with regard to the information submitted by Mr Govender, it continued with its recruitment process as if all was above board. In this regard the Selection Panel disregarded adherence to the relevant legislative, regulatory framework and policy prescripts applicable in the recruitment of a senior manager position and the Tshwane Municipal Council does not appear to have satisfied itself that the candidate recommended for appointment was suitably for appointment

10 FINDINGS

10.1 Having regarded the evidence sourced during the course of the investigation, and applicable regulatory framework in determining the standard that should have been complied with, I am making the following adverse findings.

10.2 Regarding whether the City of Tshwane improperly appointed Mr Govender to the post of Chief of Emergency without him being in possession of a relevant bachelor degree or equivalent qualification as stipulated in the *Job Advertisement* for the post, and if so, whether such conduct was improper and constituted maladministration in state affairs as contemplated in section 182 of the Constitution, 1996?

10.2.1 The allegation that the appointment of Mr Govender to the post of Chief of Emergency by the City of Tshwane and/or its functionaries was irregular, is substantiated.

10.2.2 Mr Govender did not meet the appointment requirements for the post of Chief of Emergency as stipulated in the *Job Advertisement* for the post and in terms of section 56 of the Municipal Systems Act, 2000 read with its Regulations 8 and 9 of the Regulations, 2014 in that, his highest qualification being the Associate Diploma in Fire Technology is neither a bachelor degree nor an equivalent qualification.

10.2.3 The employment contract entered into between Mr Govender and the City of Tshwane is null and void in terms of section 56(2) of the Municipal Systems Act, 2000 as he was appointed in the post without being in possession of the prescribed qualification;

10.2.4 The Associate Diploma in Fire Technology does not meet the definition of a qualification in terms of the Higher Education Qualifications Framework Act, 1997 (Act No. 101 of 1997) and the National Qualifications Framework Act, 2008;

- 10.2.5 The insertion by Mr Govender in the *Application for Employment at City of Tshwane Form* and the *Curriculum Vitae* reflecting that his qualification is an *Advanced (Associate) Diploma in Fire Technology equivalent (NQF 7)* while being aware that it was not, is manifestly incorrect, false, misleading and constitutes an act of misrepresentation;
- 10.2.6 The Selection Panel overlooked the *MIE Verification Report* which pickup materially discrepancies and misrepresentation on the information submitted by Mr Govender relating to his qualification and it proceeded with the recruitment and selection process as if all was above board;
- 10.2.7 The salary paid to Mr Govender from 1 August 2017 to date, constitutes unlawful enrichment as he was he not qualified for appointment in the post of Chief of Emergency; and
- 10.2.8 The salary paid to Mr Govender from 1 August 2017 to date, while he was not qualified for appointment in the post of Chief of Emergency constitutes fruitless and wasteful expenditure on the part of the City of Tshwane.
- 10.3 In the circumstances, I find that the appointment of Mr Govender in the post of Chief of Emergency was irregular, unlawful and thus constituted improper conduct as envisaged by section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994.

REMEDIAL ACTION

- 10.4 The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, 1996 with a view to remedying the maladministration and improper conduct referred to in this report is the following:
- 10.4.1 The MEC for Corporative Governance and Traditional Affairs for the Gauteng Provincial Government to:**

10.4.1.1 Consider the report, and where appropriate take steps within fourteen (14) days of issuing of this report as provided for in terms of section 56(5) of the Municipal Systems Act, 2000 with a view to remedying the maladministration and improper conduct identified in the report.

10.4.2 The Tshwane Metropolitan Council to:

10.4.2.1 Take cognisance of the findings of this report as it relates to the irregularities in the recruitment and selection of senior managers accountable to the Municipal Manager that may occur in future relating to the recruitment, selection and appointment of senior managers accountable to the municipal manager;

10.4.3 The Municipal Manager of the Tshwane Metropolitan Municipality to;

10.4.3.1 Take steps and initiate disciplinary process against Mr Govender as provided for in terms of the Labour Relations Act, 66 of 1995 read with City of Tshwane Staffing Policy, 2008;

10.4.3.2 Take steps and initiate legal action to review and set aside the appointment of Mr Govender on the basis of legality;

10.4.3.3 Take steps and initiate a process of recovering a proportionate and reasonable portion of the amount paid to Mr Govender in the form of a salary and other fringe benefits commensurate with the post of Chief of Emergency;

10.4.3.4 Take steps and initiate a process of recruiting a suitably qualified person for the post of Chief of Emergency should there still a need to fill the vacancy;

10.4.3.5 Report the irregular expenditure relating to the salary paid to Mr Govender as prescribed in terms of the relevant provisions of the Municipal Finance Management Act, 2003.

10.4.4 MONITORING

10.4.4.1 The MEC for Corporative Governance and Traditional Affairs for the Gauteng Provincial Government, must within twenty (21) days of issuing this report, submit to me an implementation plan reflecting how the remedial action referred to in paragraph (10.4.1 has been implemented;

10.4.4.2 The Municipal Manager of the Tshwane Metropolitan Municipality must, within thirty (90) days from the date of issuing of this report and for my consideration, submit an Implementation Plan to my office indicating how the remedial action referred to in paragraph 10.4.3 of this report will be implemented.

11 In line with the Constitutional Court decision in ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** [2016] ZACC 11, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the City of Tshwane, unless a Court Order directs otherwise.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 8/12/2020

Assisted By: Mr Mulao Lamula, GGI